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AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-62

HUBERT WHEELER, individually and in his capacity as former Commissioner of Education, State of Missouri, MISSOURI STATE BOARD OF EDUCATION, et al.,
Petitioners,

vs.

ANNA BARRERA, individually and as Next Friend for JOANNA BARRERA, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

In this reply brief we obviously cannot comment on everything in the respondents' 95-page brief, much of it devoted to matters not within the scope of the questions on which this Court granted certiorari[1] or to claims we have not made in this proceeding nor now make.[2] We limit ourselves to brief comments and a few points asserted by respondents which we consider significant to the issues in this case.

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1. For example, pp. 41-46, which argues that "Title I project expenditures in Missouri indicate gross inequity."

2. For example, pp. 57-61, which argues that "Title I authorizes public school personnel to provide special educational services to deprived children on private school premises." Petitioners have not and do not challenge that assertion in this proceeding. They claim only that Title I does not *require* it, and if it does it is to that extent unconstitutional.

1. The Status of Missouri Law

On pp. 23-24 respondents characterize as "erroneous," "inaccurate" or "false" our statement that "providing Title I ESEA services on private school premises is contrary to Missouri law." On pp. 56-57 they develop this point further.

If, as the Court of Appeals held, Title I mandates assignment of publicly employed teachers to serve in religious schools state law to the contrary notwithstanding, then, of course, under the Supremacy Clause state law must yield and the status of Missouri law becomes irrelevant. Conversely if, as we contend, such a mandate would violate the First Amendment, the question of Missouri law again becomes irrelevant. It is only relevant if, as we contend, Title I only authorizes but does not mandate assignment of Title I teachers for on-premises services. Even in such a case its relevance is limited. It shows at most that the petitioners' policy does not constitute an arbitrary exercise of statutorily delegated discretion. (We by no means concede that even if not violative of state law, petitioners could not for other reasons establish a policy of non-assignment.)

So limited, it is quite clear that as far as the Federal government is concerned, it is the state department of education that determines what the relevant state law is. See Handbook p. 19, quoted on p. 20 of our brief. More specifically, the United States Office of Education was fully cognizant of the situation in Missouri and asserted that it was "well aware that certain types of arrangements involving private school children which may be legal in some States are not permitted under Missouri Law." (Petitioners' brief, p. 19.)

Responsibility for approving proposed Title I projects in each state is delegated by the Act to the state depart-

ments of education. It would be inappropriate and beyond the intent of Congress that a department's interpretation of its own relevant state law could be challenged in a Federal court.

2. Nature of Title I Services

On p. 24 of their brief respondents state:

> "Petitioners state that Title I services are 'basically everyday regular instruction.' (Petitioners' Brief, p. 26.) This statement is untrue. * * *"

Page 26 of our brief reads:

> "We noted in our Statement of Facts and Issues (supra, p. 9) that the Title I financed services *at issue in this case* are basically every-day regular instruction in such subjects as reading and arithmetic, the same subjects taught in the private schools in the *Lemon-DiCenso-Johnson* cases. * * *" (Emphasis added.)

On p. 24 of their brief, respondents state (elaborated on pp. 69-70):

> "Petitioners state that Title I does not include welfare benefits such as medical or dental care, breakfasts and lunches, or even psychological services for maladjusted children. (Petitioners' Brief, p. 13.) They also indicate that mentally retarded and emotionally disturbed children are not eligible. These statements are untrue. * * *"

On p. 9 of our brief we note that the Regulations cite as illustrative examples of Title I services, "therapeutic, remedial or welfare services, broadened health services, school breakfasts for poor children, and guidance and counseling services." On p. 12 we note that *in St. Louis* (and elsewhere in Missouri) mentally retarded or emotionally

disturbed children are not eligible. The reason for the statements we do make is found on p. 13 of our brief:

> "We have set forth this statement of the facts *to narrow the issues facing this Court.* We do not have *here* any controversy regarding welfare benefits, such as medical or dental care, breakfasts and lunches, or even psychological services for maladjusted children. We are dealing only with what is basically every-day, regular instruction given in elementary and secondary schools, somewhat intensified for the benefit of slower children. * * *" (Emphasis added.)

3. Employment of Nonpublic School Teachers

On p. 24 of their brief respondents state (elaborated on pp. 71-72):

> "Next, Petitioners state that it is permissible to employ regular nonpublic school teachers under Title I. This statement is untrue. Title I does not permit payment of a salary of a private school teacher. * * *"

Nowhere in our brief do we intimate that a private school teacher may simultaneously receive salaries from private school and Title I funds. Our statement, based upon pp. 34-35 of the Handbook to which we respectfully refer the Court, is that it is permissible to employ regular nonpublic school teachers to become Title I teachers, and even to train them before they become Title I employees so long as they are committed to do so.

In our brief (p. 34) we quoted from *Lemon* that "a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral." We suggested in our brief and repeat here that this difficulty will not be eliminated or

even substantially reduced by the fact that the teacher is transferred from the payroll of the religious school to that of the local educational agency, and that the only way to guard against inculcation of religious values by such a teacher is by that "comprehensive, discriminating, and continuing state surveillance" which the Establishment Clause forbids.

4. Teacher Aides

On p. 25 of their brief respondents state (elaborated on pp. 72-73):

> "Petitioners also state that Title I teacher aides may assist regular nonpublic school teachers. (Petitioners' Brief, p. 36.) This statement is untrue. * * *"

The relevant portion of p. 36 of our brief reads:

> "* * * The constitutional infirmity lies not in the failure of the state to prohibit it, but rather in the constant and continuing surveillance necessary to make the prohibition meaningful. The same is true of the use of Title I teacher aides to assist regular teachers when they are not busy with their Title I activities. *The Program Guide forbids this,* but enforcement would require continuing on the spot policing; * * *" (Emphasis added.)

5. Petitioners' Standing

On pp. 82-87 of their brief respondents assert that the "State Board of Education has no standing to challenge the constitutionality of Title I, ESEA, or of its program."

We do not, of course, challenge the constitutionality of Title I or even that part of it which requires that provision be made for including special educational services and ar-

rangements in which children enrolled in religious or other nonpublic schools can participate. We assert only that to accede to respondents' demand that Title I teachers be assigned to serve in religious schools during regular school hours would violate the Establishment Clause of the First Amendment. We are unable to see how public officials called upon by private citizens to perform an act the former deem unconstitutional cannot assert the claim of unconstitutionality as defense in a suit to compel them to perform the act.

In any event, the standing of members of a state school board to challenge even affirmatively the constitutionality of a statute requiring them to act in a way deemed by them to be unconstitutional is no longer open to question in view of the holding in *Board of Education* v. *Allen*, 392 U. S. 236, 241, footnote 5 (1968).

6. The Justiciability of the Constitutional Issue

On pp. 87-88 respondents contend that the constitutional issue was not timely presented and that in any event it is not now ripe for determination.

In respect to timeliness, we note that the constitutional issue as now before this Court was presented to and exhaustively argued in the District Court. Since the District Court held that the Act does not mandate assignment of Title I teachers to serve in religious schools, it found it unnecessary to pass upon the constitutional issue, although it did note that if its interpretation of the statute was incorrect "then the teachings of the Supreme Court in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971) would raise serious questions as to the constitutionality of Title I." Pet. for Certiorari, p. A44. The constitutional issue was again thoroughly argued in the Court of Appeals, and that Court held that mandatory assignment of Title I teachers

to serve in religious schools did not violate the Establishment Clause. On the basis of that decision, the District Court issued an Injunction and Judgment in Compliance with Mandate (of the Court of Appeals) stating specifically and expressly: "Defendants are enjoined from disapproving any application of a Local Educational Agency (LEA) for the grant of Federal Title I ESEA Funds on the basis that such application includes use of Title I personnel on private school premises during regular school hours." Pet. for Certiorari, p. A46. (This injunction and judgment was prepared by respondents and signed by the District Court judge exactly as submitted by them.)

As a precautionary measure, on June 6, 1973, petitioners filed in the District Court a notice of appeal to the Court of Appeals from the said injunction and judgment. On July 5, 1973 petitioners filed in this Court a petition for writ of certiorari to review the judgment of the Court of Appeals, or in the alternative for a writ of certiorari under 28 U.S.C. Section 2101(e) to review the District Court's order and judgment before judgment of the Court of Appeals. On October 15, 1973 this Court granted the petition for certiorari without indicating under which alternative the grant was made. On October 25, 1973, the Court of Appeals on application of the petitioners suggesting mootness by reason of the granting of the petition herein, dismissed the appeal from the District Court's injunction and judgment.

Whether this Court is considering the case under a writ of certiorari to review the judgment of the Court of Appeals or to review the judgment of the District Court, we submit that by reason of these circumstances the constitutional question of the assignability of Title I teach-

ers to serve in religious schools is fully ripe for determination by this Court.

Respectfully submitted,

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